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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1298

JOHN J. McMULLEN ASSOCIATES, INC., *Petitioner*

v.

STATE BOARD OF HIGHER EDUCATION, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

MARTIN FLEIT
HARVEY B. JACOBSON, JR.
300 Munsey Building
Washington, D. C. 20004

ERSKINE B. WOOD
15th Floor Standard Plaza
Portland, Oregon 97204

Attorneys for Petitioner

Of Counsel:

STEVENS, DAVIS, MILLER & MOSHER
300 Munsey Building
Washington, D. C. 20004

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, John J. McMullen Associates, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, which dismissed petitioner's suit.

OPINIONS BELOW

The opinion of the U. S. District Court for the District of Oregon is reported at 268 F. Supp. 735 and is reprinted in Appendix A of this Petition, pp. 1a-9a. The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 406 F.2d 497 and is reprinted in Appendix B of this Petition, pp. 10a-11a.

JURISDICTION

The judgment of the Court of Appeals is dated January 23, 1969, and was entered on the same date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Since no prior decision in this Court or any other court of the land has dealt directly or indirectly with the issues of this case, the questions presented for review are:

1. Does the exclusive jurisdictional requirement of 28 U.S.C. § 1498 (suits for patent infringement resulting from Government procurement must be brought in the Court of Claims) apply to preclude maintaining suit in District Court for patent infringement by a grantee using Federally-granted funds?

2. Is a grantee's infringing activities funded by a Federal grant "for the Government [United States]" within the meaning of 28 U.S.C. § 1498?

STATEMENT OF THE CASE

Petitioner is the owner of several patents relating to roll stabilizers for ships. Oregon State University, controlled by respondent State Board of Higher Education, obtained title to a ship (F/S 210) from the United States Government and, subsequently, privately contracted with respondent Albina Engine & Machine Works, Inc., to convert same to an oceanographic research ship using grant funds obtained from the National Science Foundation. In the conversion, a roll stabilizer infringing upon petitioner's patents was installed. Use of the ship by Oregon State University for oceanographic research was totally funded by Fed-

eral money received from Navy Department and Atomic Energy Commission contracts and National Science Foundation grants.

Action for patent infringement was commenced in the United States District Court for the District of Oregon, jurisdiction being predicated upon 28 U.S.C. § 1338(a). The District Court, following a trial on the segregated issue—lack of jurisdiction, 28 U.S.C. § 1498—dismissed the suit because respondents' infringing activities using Federally-granted funds were "for the Government" and, therefore, covered by 28 U.S.C. § 1498.

Appeal was taken to the Court of Appeals for the Ninth Circuit. After hearing argument, the Court affirmed the lower Court, but restricted its holding to the facts of this case and expressly did not embrace the District Court's holding that § 1498 covers all research grants.

REASONS FOR GRANTING WRIT

This case involves a timely and important question of Federal law which has not been, but should be, settled by this Court, namely, does 28 U.S.C. § 1498 cover infringing activities funded by Federal grants. There is no other prior decision in this Court or any other court of the land which has dealt with this question directly or indirectly. All other prior cases involving § 1498 concerned Government contracts.

The Federal Government, has, for many years, funded a number of programs using grants, among the more common being disaster relief, health, and agriculture. Since World War II, the Federal Govern-

ment has been called upon with greater and greater frequency to supply grant funds for a host of programs, including road building, public housing, education, basic scientific research, the War Against Poverty, and a myriad of others. The total funds expended annually in the form of grants is now well into the billions.

The questions raised in this novel case call upon the Federal Judiciary to decide whether the Federal Government in the Court of Claims will stand responsible for all patent infringing activities by grantees, or if the grantees themselves will have to be directly accountable to patent holders in infringement suits in the District Courts. The decision of the District Court in the instant case seemed to yield a definitive holding that a grantee's activities clearly came within and were covered by § 1498, and, therefore, a complaining patent owner had to proceed against the Federal Government in the Court of Claims. The decision by the Court of Appeals—by restricting its holding to the specific facts of the case and not embracing the broader, more definitive holding of the District Court—fails to establish a precedent.

Respecting the legislative history of § 1498, in 1910[1], Congress provided, for the first time, a remedy against the United States for patent infringement. Then, in

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[1] Act of June 25, 1910, c. 423, 35 Stat. 851, provides in pertinent part:

> "That whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims . . ."

1918[2], Congress, spurred by possible interference with the war effort, amended the Act of 1910 and assumed all liability for patent infringements resulting from Government procurement, thereby precluding suits against Government contractors. Finally, in 1942, by passage of the Royalty Adjustment Act[3], Congress,

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[2] Act of July 1, 1918, c. 114, 40 Stat. 705, provides in pertinent part:

> "That whenever an invention described in and covered by a patent of the United States shall hereafter be used *or manufactured* by *or for* the United States without license of the owner thereof or lawful right to use *or manufacture* the same, such owner's remedy shall be by suit *against the United States* in the Court of Claims *for the recovery of his reasonable and entire compensation for such use and manufacture:* Provided, however, That said Court of Claims shall not entertain a suit or award compensation under the provisions of this Act where the claim for compensation is based on the use *or manufacture* by *or for* the United States of any article heretofore owned, leased, used by, or in the possession of the United States . . . ." [Changes from Act of 1910 in italics]

[3] The portion of The Royalty Adjustment Act applicable to the statutory history of § 1498 was Sec. 6 (second half) which introduced the language now appearing as the second paragraph of the present statute:

> "For the purpose of this Act, the manufacture, use, sale, or other disposition of an invention, whether patented or unpatented, by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government shall be construed as manufacture, use, sale, or other disposition for the United States; and for the purposes of the Act of June 25, 1910, as amended (40 Stat. 705; 35 U.S.C. 68), the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States." The Royalty Adjustment Act of October 31, 1942, Sec. 6, c. 634, 56 Stat. 1013.

again facing a wartime situation and a greatly expanded production, sought to limit its assumption of liability only to those infringements it had authorized or to which it had consented.

After World War II, the Act of 1910, then a part of Title 35 of the United States Code (40 Stat. 705 (1918), 35 U.S.C. § 68 (1952)), was reworded and transferred to Title 28[4] and, subsequently, amended again to follow more closely the language employed in the 1918 amendment.[5] However, none of these changes was material, and in 1951, Sec. 6 of the Royalty Adjustment Act, with its requirement for authorization or consent, was substantially incorporated into 28 U.S.C. § 1498.[6]

The purpose and significance of § 1498 to the Federal Government is stated clearly and concisely in the Opinion of the Comptroller General, 38 Comp. Gen. 276, 119 U.S.P.Q. 187 (1958). This opinion followed the Comptroller General's decision in *Herbert Cooper,* B-136916 (August 25, 1958) (unpublished) and was requested by the Secretary of the Air Force to clarify what he felt were "broader implications" of the *Herbert Cooper* opinion. The Comptroller replied:

> ". . . It is suggested that the indiscriminate use of the right afforded to the Government under 28 U.S.C. 1498 would be inimical to and destructive of the public policy considerations underlying

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[4] Act of June 25, 1948, ch. 646, 62 Stat. 941, 35 U.S.C. § 68, repealed by 62 Stat. 998 (1948).

[5] Act of May 24, 1949, ch. 139 § 87, 63 Stat. 102 (1949).

[6] Act of October 31, 1951, ch. 655, § 50(c), 65 Stat. 727. In the codification of Sec. 6 of the Royalty Adjustment Act, the words "sale, or other disposition" were omitted.

the patent law. It is our view, however, that section 1498 appears clearly to constitute a modification of the patent law *by limiting the rights of patentees insofar as procurement of supplies by the Government may be concerned,* and by vesting in the Government a right to the use of any patents granted by it upon payment of reasonable compensation for such use. We believe that the statute is not consistent with any duty on the part of a contracting agency of the Government to protect the interests of patentees or licensees *with respect to articles which it proposes to purchase,* since the statute itself defines and provides an exclusive remedy for enforcement of the patentee's rights as to the Government. Any other interpretation would appear to us to impose an impossible burden upon Government procurement officials to determine the applicability and validity of any patents affecting any articles desired.

"Where the procurement is to be made by formal advertising, it is our opinion, notwithstanding what was said in 13 Comp. Gen. 173, that there is no alternative to the securing of the maximum amount of competition from firms qualified and willing to undertake the production of the articles, subject, of course, to their willingness and ability to indemnify the Government against claims of patentees." (at 119 U.S.P.Q. 188) [Emphasis added]

Respecting the law on grants of Federal funds, the basic position was announced by this Court in the decision of *King County* v. *Seattle School District No. 1,* 263 U.S. 361, 68 L.Ed. 339 (1923).[7]

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[7] The particular funds, money received from forest reserves, were granted by Act of Congress to the several states to be expended as the state legislatures prescribed for the benefit of the public schools and public roads of the counties in which the forest reserves were situated. For certain years, money granted

A number of opinions have been issued by the Comptroller General which seem to render more difficult a simple application of § 1498 to the questions presented in this Petition.[8]

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to King County via the State of Washington was divided approximately 90% for roads and 10% for county schools. The school board charged that the county was obligated by the grant to divide the money equally for the two uses. The Court decided in favor of the county.

The following language from the decision is of significance to the present questions:

> "When turned over to the state, the money belongs to it absolutely. There is no limitation upon the power of the legislature to prescribe how the expenditures shall be made for the purposes stated, though, by the act of Congress, 'there is a sacred obligation imposed on its public faith.' Cooper v. Roberts, 18 How. 173, 181, 15 L.ed. 338, 341; Alabama v. Schmide, 232 U.S. 168, 173, 58 L.ed. 555, 558, 34 Sup. Ct. Rep. 301; Mills County v. Burlington & M. River R. Co., 107 U.S. 557, 566, 27 L.ed. 578, 581, 2 Sup. Ct. Rep. 654; Hagar v. Reclamation Dist., 111 U.S. 701, 713, 28 L.ed. 569, 574, 4 Sup. Ct. Rep. 663. * * * The public schools and public roads are provided and maintained by the state or its subdivisions, and the moneys granted by the United States are assets in the hands of the state, to be used for specified purposes as it deems best. See State ex rel. Moore v. Callvert, 34 Wash. 58, 61, 74 Pac. 1018." (at pages 364-365)

[8] In his unpublished opinion B-145140, dated May 3, 1961, the Comptroller General advised the International Boiler Works Co. of East Stroudsburg, Pennsylvania, that the Federal Government could not act upon its protest concerning specifications covering high temperature water boilers used in P.H.A. Aided Project No. Ill-2-37, Stage III, Chicago, Illinois, despite origination of the funds with the Federal Government:

> "The report points out that the Federal Government is not a party to the general construction contract between the Chicago Housing Authority and the Gust K. Newburg Construction Company. Our Office has recognized that the low-rent housing program, although assisted by Federal subsidies,

In view of these opinions by the Comptroller General, recipients of grant funds are *not obligated* to

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is essentially a local program. See our decision B-126528, dated February 17, 1956, a copy of which is enclosed. The Chicago Housing Authority is not an agency of the Federal Government, but is separate and apart and is not subject to Section 3709 of the Revised Statutes, as amended, or other statutes which require advertising for bids.

* * * * * * * * * *

"In an analogous situation involving a protest against specifications allegedly favoring one manufacturer for elevators to be used in a hospital project involving Federal assistance funds, we held in decision B-141932, dated May 2, 1960, that it was the duty of the Surgeon General to determine compliance with the regulations imposed by him, and no action by our Office was warranted after the Surgeon General had approved the specifications."

In his opinion to the Secretary of State, reported at 42 Comp. Gen. 289 (B-149441) (1962), the Comptroller General stated:

"There can be no doubt that only the Congress is legally empowered to give away the property or money of the United States, and that when it makes grants of funds to the States and other public or private agencies it has a right to designate the purpose thereof and to surround the grant by such conditions as it chooses to impose. *State of Indiana* v. *Ewing*, 99 F. Supp. 734, cause remanded 195 F.2d 556. * * *" (at page 293)

Also, in an opinion reported at 37 Comp. Gen. 85 (B-132417) (1957), to the Secretary of Agriculture, the Comptroller General held that a sales tax can be paid on purchases made with Federally-derived grant funds. Note the following excerpt from the opinion:

"The first question here is whether the States, in obligating and disbursing the funds granted to them by Congress for cooperative agricultural extension work and experiment station research, stand in such relation to the Government that purchases by a State become, in legal effect, purchases by the United States. If such a relationship exists or, in other words, if the funds so granted must continue to be regarded as Fed-

follow Title 41, U.S.C. § 5, requiring advertising, competitive bidding, and compliance with the general laws, nor is the grantee subject to supervision by the General

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eral funds until disbursed by the State officials, who in that case would be acting as agents of the United States, then it follows that payment of State sales taxes, the legal incidence of which is on the purchaser, would violate the Constitutional immunity of the United States against State and local taxation.

"The general rule regarding the character and status of such funds is stated in 28 Comp. Gen. 54 as follows:

'* * * it consistently has been held with respect to Federal funds granted to a State that, when such funds are receipted for by the State, they become State funds and, in the absence of a condition of the grant specifically prescribing to the contrary, are totally divested of their identity as Federal funds and become funds of the State and the expenditure thereof is subject to the laws and regulations applicable to the expenditure of State funds rather than by Federal laws applicable to the expenditure of appropriated moneys by the departments and establishments of the Government.'

"That this rule is applicable to grants for agricultural extension work and for the work carried on by State agricultural experiment stations seems apparent from the language of the controlling statutes. 7 U.S.C. 341-348; 361-389, Supp. IV. *Cf.* 25 Comp. Gen. 868 and 36 Comp. Gen. 84.

"The States, therefore, in disbursing grant funds for purposes within the scope of the grant, may not be considered as 'agents' of the United States; and, except for conditions specified by Congress in the grants, they are subject only to the restrictions imposed by State laws and regulations on the disbursement of other State funds. If a State, under its laws, is required to pay sales taxes on purchases made with funds derived from State revenues, we can see no reasonable basis for holding that such sales taxes may not likewise apply to purchases with funds obtained by the State through a Federal grant, provided the terms of the grant do not expressly prohibit the payment of such taxes." (at pages 86 and 87)

Accounting Office or any of the restrictions or limitations stated in Federal statutes, including the Federal Procurement Regulations (Title 41 C.F.R.) and the ASPR Regulations (Title 32 C.F.R., Chap. 1, Subchap. A, Parts 1-30), whereas a Government contractor is subject to all of the foregoing (41 U.S.C., Chap. 4, §§ 251-260, and 10 U.S.C., Chap. 137, §§ 2301-2314).

Most recently, in a decision of the Comptroller General, reported at 43 Comp. Gen. 697 (B-153348) (1964), addressed to The Honorable Leland J. Haworth, Director, National Science Foundation, the specific questions presented for the Comptroller General's decision were: (1) Whether expenditures may be made from NSF research grants supporting research at nonprofit institutions for the purchase, maintenance, or operation of aircraft where required to conduct the research for which the grant has been made, and (2) whether the Foundation may reimburse a cost contractor operating a Federally-owned research center for costs incurred by the contractor in obtaining the use of the aircraft necessary to carry out research activities at the center.

The particular Federal statute involved was 5 U.S.C. § 78(b) [now 31 U.S.C. § 638a(b)]:

> "Excepting appropriations for the Military and Naval Establishments, no appropriation shall be available for the purchase, maintenance, or operation of any aircraft unless specific authority for the purchase, maintenance, or operation thereof has been or is provided in such appropriation."

The Comptroller General reached the conclusion that the grantee may buy the aircraft, since the expenditure of grant funds is not subject to the restrictions and

limitations imposed by Federal statute.[9] By the same token, the Comptroller General reached the opposite conclusion with respect to reimbursement of the contractor operating the Federally-owned research center, because the statutory restrictive provisions of 5 U.S.C. § 78(b) applied to him.

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[9] "Whether the restriction contained in 5 U.S.C. 78(b), quoted above, applies to expenditures made by a grantee from funds granted by the Foundation for the conduct of basic research, will depend of course on the terms and conditions of the particular grant. It consistently has been held with reference to Federal grant funds that, when such funds are granted to and accepted by the grantee, the expenditure of such funds by the grantee for the purposes and objects for which made are not subject to the various restrictions and limitations imposed by Federal statute or our decisions with respect to the expenditure, by Federal departments and establishments, of appropriated moneys in the absence of a condition of the grant specifically provided to the contrary. See 36 Comp. Gen. 221, 224 and decisions cited therein.

"Since the funds appropriated for the National Science Foundation are made available for expenses necessary to initiate and support basic scientific research, and since the Foundation is authorized to accomplish this purpose by various methods, including grants, it follows that the rule set forth above with reference to the expenditure of grant funds by the grantee would appear equally applicable to grants made by the Foundation for basic scientific research. Consequently, if expenditures for the purchase, maintenance or operation of aircraft are administratively determined to be required for the effective accomplishment of the purpose or objects for which a research grant is made, no objection will be interposed thereto solely by reason of the restrictive provisions of 5 U.S.C. 78(b), which for the reasons stated here have no application to such research grants. The first question presented is answered accordingly." 43 Comp. Gen. 697 (B-153348) (1964), at pp. 699-700.

CONCLUSION

Although the foregoing is relevant and interesting, the fundamental question of whether or not a Federal grantee, as a Government contractor, is covered by the umbrella afforded by 28 U.S.C. § 1498 remains unanswered.

In light of the vast sums being granted annually and the total absence of a definite legal policy or guideline in our body of law respecting whether or not 28 U.S.C. § 1498 covers infringing activities funded by Federal grants, this timely and important question of Federal law should be settled by this Court. For the reasons set forth above, petitioner respectfully submits that this Court should exercise its discretionary jurisdiction and that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MARTIN FLEIT
HARVEY B. JACOBSON, JR.
300 Munsey Building
Washington, D. C. 20004

ERSKINE B. WOOD
15th Floor Standard Plaza
Portland, Oregon 97204

Attorneys for Petitioner

Of Counsel:

STEVENS, DAVIS, MILLER & MOSHER
300 Munsey Building
Washington, D. C. 20004

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 65-261

Opinion

BEEKS, District Judge:

This patent infringement action, brought by John J. McMullen Associates, Inc. ("McMullen"), arises from the alleged incorporation of a patented stabilization tank into a vessel which was adapted and used for oceanographic research by Oregon State University ("OSU"). The vessel was acquired from the U. S. Army at no cost to OSU; and the costs of its conversion and of its use for research purposes have been financed by Government grants and contracts. Defendants contend that the Court of Claims has exclusive jurisdiction over this case by virtue of 28 U.S.C. § 1498.[1] For purposes of this defense, this court

[1] The relevant portions of that statute provide:

(a) Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture.

For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States . . . . (28 U.S.C. § 1498 (a))

must assume that the patents in question were valid and infringed, and the determinative question is whether the manufacture and use of the stabilization tank were "for" the United States, within the meaning of the statute. The parties have presented evidence, arguments and briefs on this limited question, and it is the only issue here decided.

Oceanographic research was started at OSU in 1954, financed at least in part by a contract with the United States Navy for performance of certain research projects. The research work required the use of a vessel, and in the early years of the program, OSU chartered small fishing vessels for this purpose. Later, OSU was permitted to use the ACONA, a U. S. Government vessel.

Governmental support of oceanographic research was substantially expanded in 1959 with the establishment of a special agency[2] to coordinate the activities of the many government agencies which benefit from and sponsor oceanographic research. The ten-year plan published in June of 1963 by that agency (which is in evidence), states that one of the ways such support would be implemented in the decade following 1963 is by the addition of seagoing research vessels to the fleets of private laboratories and university departments, using NSF and Navy funds.

In the same year this report was published, 1963, OSU received from the Government at no cost a surplus Army Air Corps Maintenance and Supply vessel, the FS 210, which was renamed the YAQUINA. Under the terms of the transfer of the vessel to the State of Oregon, the vessel could, "be used only for the health or educational purpose for which acquired, including research for any such purpose, and for no other purpose." The grant provides for a period of restriction of two years of the desig-

[2] The Interagency Committee on Oceanography of the Federal Council for Science and Technology.

nated use of the vessel, during which time OSU was prohibited from selling, leasing, encumbering, lending, or otherwise disposing of it without the consent of the U. S. Government.

Substantial alterations were required to equip the YAQUINA for oceanographic research. To finance these alterations, OSU applied to the National Science Foundation for a grant, submitting several proposals for the necessary alterations.

By a grant letter of June 7, 1963, NSF formally accepted a conversion proposal by OSU and granted $600,000 for the conversion of the vessel.[3] The conditions of the NSF grant included: "The grantee shall use the vessel primarily for the conduct of basic scientific research and if the Foundation shall determine that she is not being used sufficiently and efficiently for research, the grantee will convey her to the U. S. Government or its nominee without further cost to the Government. . . ." A further condition was: "The grantee shall not dispose of the vessel without the prior approval of the National Science Foundation. . . ." The grant also obligated OSU to convey the vessel to the U. S. Government without cost to the Government in case of declared national emergency.

The plans for the conversion of the YAQUINA which were submitted to the NSF prior to its grant of $600,000 for this purpose did not show that plaintiff's patented stabilization tank would be incorporated in the vessel. But a letter from an NSF official to the Office of the General Counsel of NSF (introduced into evidence) reflects that NSF knew, at least as early as September of 1963, that OSU intended to use such a tank in the YAQUINA. In April of 1964, NSF increased by $170,000

[3] The NSF is charged with the statutory duty of supporting basic scientific research, and is authorized to do so by means of grants as well as other forms of assistance. 42 U.S.C. § 1862(a)(2)

its earlier grant to OSU for the conversion project. In August of 1964, moreover, NSF approved plans submitted by OSU which showed in detail plaintiff's stabilization tank as one of the proposed alterations to the vessel. The YAQUINA went into service as a research vessel in October of 1964, containing plaintiff's patented stabilization tank, and has been continuously engaged in successful oceanographic research ever since. The costs of operation and use of the vessel have been financed approximately as follows: 50% by grant from the NSF; 40% under research contracts with the Navy; and 10% under contracts with the Atomic Energy Commission ("AEC"). The record is not entirely clear as to what use has been made of the tank.

Plaintiff McMullen brought this action in May of 1965 alleging infringement of its four patents relating to this stabilization tank. The defendants included the State Board of Higher Education, which manages and controls OSU; the nine individual members of the State Board; the President of OSU; the Chairman of the Oceanography Department of OSU; the master of the YAQUINA; and the shipbuilder that converted the vessel for oceanographic research purposes.

Against this factual background, the question for the Court's determination is whether the manufacture and use of plaintiff's stabilization tank were "for" the Government within the meaning of § 1498. Plaintiff points out, correctly, that heretofore the jurisdictional strictures of § 1498 have generally been applied only in cases where infringement occurred during the performance of a contract to supply the Government specific goods or services. While a substantial portion of the usage of the YAQUINA has been under contract with the Office of Naval Research and the AEC for specific research projects, she also has been used extensively for "basic research" under grants from the NSF. Plaintiff questions whether the language of

§ 1498, in requiring that a device be manufactured or used "for" the Government, was intended to include within its ambit such research work under Government grants. From an examination of the legislative history and purpose of that section, this Court concludes that such an interpretation is not only permissible but required.

The Supreme Court reviewed the history and purpose of the precursor of § 1498 in *Richmond Screw Anchor Co.* v. *U. S.*, 275 U.S. 331 (1928). This section was enacted in 1918, at the height of the First World War, to encourage private concerns to manufacture crucial products and to perform vital services for the U. S. Government, even where such activities might generate claims of patent infringement. Apparently the risk and burden of patent infringement litigation had impeded performance of these functions for the Government by private concerns;[4] and this legislation was enacted to shift those burdens to the Government.

From the evidence in the case at bar, the Court concludes that (1) oceanographic research, including "basic" research of unknown practical application, has been recognized by the legislative and executive branches as vital to the interests of the U. S. Government; (2) the conversion and use of the YAQUINA, including the manufacture and use of the stabilization tank, were to equip it for such research, and therefore were "for" the Government; and (3) both the manufacture and use of the stabilization tank were with the authorization and consent of the Government.

The prime indication that "basic" oceanographic research has been recognized as serving vital interests of

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[4] This situation was outlined in a letter from the Acting Secretary of the Navy, Franklin D. Roosevelt, to the Chairman of the Committee on Naval Affairs of the Senate. The letter is quoted in part in the *Richmond Screw Anchor* opinion, and in full in *Wood* v. *Atlantic Gulf & Pacific Co.*, 296 F. 718, 720-1 (S.D. Ala. 1924).

the U. S. Government is the dedication of substantial sums of government funds in support of such research. That conclusion is also indicated by reports of government agencies and transcripts of Congressional hearings which are in evidence. The ten-year plan for the support of oceanographic research, published in 1963 by the Interagency Committee on Oceanography of the Federal Council for Science and Technology, lists some of the goals of government support for oceanographic research. They include the improvement of national defense, the utilization of the sea as a source of food and other resources, the possibility of using the sea for disposal of nuclear wastes, the safeguarding of public health, and the safeguarding of lives and property from storms at sea and from dangers to navigation. But at the head of the report's list of goals is the strengthening of basic science through the sponsorship by the Government of "basic" research of unknown practical application. Of such research, the report states:

> We know from experience in war, in tough economic competition, and in man's fight for a life free of poverty and disability that research pays. It is the Federal Government that, in oceanography as in other fields, has strengthened basic research to provide the reservoir of intelligence needed to satisfy specific practical objectives. It must thus assume some responsibility for training and educating highly skilled manpower that it consumes, including the sponsorship of basic research undertaken by graduate students and their faculty advisors.

The Court therefore concludes that basic research in oceanography has been recognized by the legislative and executive branches as serving vital interests of the U. S. Government.

On the question of whether the conversion and use of the YAQUINA, and the manufacture and use of the tank,

were "for" the government, plaintiff points out that title to the vessel passed to the State of Oregon when the vessel was transferred from the Government; that Customs and Coast Guard documents since that time show the State as owner of the vessel; and that a state agency contracted for the conversion of the vessel for research purposes and was responsible for paying the costs thereof. From this, plaintiff concludes that the conversion and use of the vessel, and the manufacture and use of its stabilization tank, were "for" the State, not the U. S. Government.

Furthermore, plaintiff argues that at least to the extent that the research work being done aboard the YAQUINA has been financed by grants, such research was not "for" the Government because: (1) the NSF, which made the grants, is not itself charged with the responsibility of doing the research; and (2) where one donates funds for expenditure on a project by another, it does not necessarily follow that the project is being done "for" the donor.

The Court concludes that to accept these arguments would be to permit the form of the relationship to govern while ignoring the substantive interests involved. While it may be true that for some purposes the State held title to the vessel, the grants under which the vessel was acquired and under which the conversion was made imposed severe limitations upon the State's ownership. Those restraints, as discussed above, included restrictions upon the use of the vessel and against any disposal of the State's interest in the vessel without the consent of the U. S. Government. Where the Government finances the manufacture of a device and grants it to a private agency with the stipulation that it can only be used for specified purposes, and such use advances recognized vital interests of the U. S. Government, the conclusion is inescapable that such manufacture and use were "for" the U. S. Government.

Furthermore, the Court finds that both the manufacture and use of the patented stabilization tank were with the

authorization and consent of the Government, within the meaning of § 1498. The evidence shows that the NSF not only knew that plaintiff's tank would be installed in the YAQUINA before it was actually accomplished, but had consented in writing to such installation as permissible under the grants made to finance the costs of conversion of the vessel.

Upon these findings, the Court therefore concludes that plaintiff's exclusive remedy is against the Government by a suit in the Court of Claims under 28 U.S.C. § 1498.

Three further contentions of plaintiff require disposition. First, plaintiff alleges that the Government did not require that the patented stabilization tank be used in the research work of the YAQUINA, and that in fact the tank was not so used at any time prior to the inception of this litigation. Plaintiff argues that therefore while the use of the vessel may have been for the Government, the use of the tank was not.

The Court of Appeals for the 4th Circuit considered the significance of the Government's failure to require use of a patented device in *Bereslavsky* v. *Esso Standard Oil,* 175 F. 2d 148 (4th Cir., 1949). Although the Court there found that the use of the infringing device was implicitly required by the Government, it went on to hold:

> In the second place, there is no language in the statute [§ 1498] which limits its application to cases where the government contracts expressly for what will infringe, but, on the contrary, it applies in any case where the invention of the patent is "used or manufactured by or for the United States." To limit the application of the statute to cases where officers of the government intentionally contract for patent infringement would in very large measure defeat its purpose. (175 F. 2d at 150.)

This Court concurs in the view that the failure of the Government to require the use of the patented device does not preclude the application of § 1498.

Plaintiff's claim that the tank has not been used to benefit research aboard the YAQUINA is simply not borne out by the record. The Chairman of the Oceanography Department of OSU testified that the stabilization tank was necessary in connection with the use of delicate scientific instruments aboard ship; and the record indicates that the actual use made of the tank, albeit somewhat intermittent, was for this purpose or for other purposes benefiting the performance of the research projects. The Court finds, therefore, that the use of the tank, as well as of the vessel, was "for" the Government.

The parties have devoted substantial portions of their briefs to the question of whether it is necessary, under § 1498, to show *both* manufacture *and* use for the Government, or whether a showing of either is sufficient to vest sole jurisdiction in the Court of Claims. Inasmuch as it appears that both manufacture and use were for the Government, this issue need not be resolved.

Finally, plaintiff contends that even if the Court of Claims has jurisdiction over this case by virtue of § 1498, this Court should retain jurisdiction over the Chairman of the OSU Department of Oceanography and over the shipbuilder which converted the YAQUINA for research purposes. Section 1498 clearly states that in cases within its ambit the patentee must seek his "entire" compensation in the Court of Claims. This action must therefore be dismissed as against all defendants for lack of jurisdiction.

Complaint dismissed.

Dated this 17th day of May, 1967.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,225

[January 23, 1969]

Before: HAMLEY, HAMLIN and HUFSTEDLER, Circuit Judges

PER CURIAM:

On this appeal, the principal issue is whether the district court had jurisdiction to entertain this suit for patent infringement. It did not have jurisdiction, and the case must be taken to the Court of Claims, if the patented devises, used in research financed in part by National Science Foundation grants, were "used or manufactured by or for the United States" within the meaning of 28 U.S.C. § 1498 (1964).

For reasons stated in the opinion of the district court, reported in 268 F. Supp. 735, we hold that, in this particular case, the patented articles involved were made for or were being used by the United States, and that the claims of infringement must therefore be dismissed. However, we do not necessarily endorse the district court's general statement that an interpretation of section 1498 which includes all research grants is "required."

Rather than pass upon this general proposition, we restrict the holding to the facts of this case. Here, the patented articles were used in work of vital importance to the government. Additionally, the National Science Foun-

dation grant appears to have been primarily a financing device for work of special interest to the United States Navy. Moreover, the ship employing the devices was used only for research approved and financed by the government.

While the above holding does not, in terms, dispose of plaintiff's trademark claim, we regard that claim as frivolous and properly dismissed for that reason. The record indicates that the United States Navy and the National Science Foundation knew with whom they were dealing and that there was no confusion or palming off by reason of the use, by defendants, of a name similar to plaintiff's trademark.

Affirmed.

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In the Supreme Court
of the United States

OCTOBER TERM, 1968

No. 1298

JOHN J. McMULLEN ASSOCIATES, INC.,
Petitioner,

v.

STATE BOARD OF HIGHER EDUCATION, et al.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN W. BLORE
703 Board of Trade Bldg.,
Portland, Oregon 97204
Attorney for Respondent

Of Counsel:
BUCKHORN, BLORE, KLARQUIST AND SPARKMAN,
JOSEPH B. SPARKMAN,
ARTHUR L. WHINSTON
703 Board of Trade Building,
Portland, Oregon 97204,
ROBERT Y. THORNTON
WOLF VON OTTERSTEDT
P.O. Box 5715
Eugene, Oregon 97401
WILLIAM B. SHIVELY
612 Portland Building
Portland, Oregon 97204

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 5-69

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This case comes before this Court on a Petition by John J. McMullen Associates, Inc., plaintiff below, for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 406 F.2d 497. The opinion of the District Court for the District of Oregon is reported at 268 F. Supp. 735.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

Question 1 as Presented by Petitioner

1. Does the exclusive jurisdictional requirement of 28 U.S.C. Sec. 1498 (suits for patent infringement resulting from Government procurement must be brought in the Court of Claims) apply to preclude maintaining suit in District Court for patent infringement by a grantee using Federally-granted funds?

Question 1 as Restated by Respondent

1. Does the exclusive jurisdictional requirement of 28 U.S.C. Sec. 1498 apply to research projects for Government agencies wholly financed by Government funds, using a ship supplied by the Government and converted for such research using Government funds, and whose operation and maintenance has been financed wholly by Government funds?

Question 2 as Presented by Petitioner

2. Is a grantee's infringing activities funded by a Federal grant "for the Government [United States]" within the meaning of 28 U.S.C. Sec. 1498?

Question 2 as Restated by Respondent

2. Is the conversion and use of a surplus Government vessel by a Government contractor for admittedly vital Government oceanographic research, and with the authorization and consent of the Government, manufacture and use "for the Government" within the meaning of 28 U.S.C. Sec. 1498?

STATEMENT OF THE CASE

I

This Case Stems from a National Oceanographic Program Conducted by the Government to Procure Vital Research Information.

The United States Government discovered in the 1950's that there was a serious deficiency in its store of basic oceanographic knowledge, which deficiency posed a threat to the nation's defense. Many of the pertinent studies and documents showing this gap and its seriousness are listed in a federal pamphlet entitled "Abridged Chronology of Events Related to Federal Legislation of Oceanography 1956-1965." One of the prominent papers listed in this Chronology is Senate Resolution 136, wherein (at page 11395 of the Congressional Record for July 13, 1959) it is stated:

> "Resolved, That the Senate—
>
> (1) commends the report of the Committee on Oceanography to the President, the Bureau of the Budget, and to the heads of the five departments and nine agencies which would participate in the ten-year program of oceanographic re-

search recommended by the Committee, for their study and consideration with a view to *overcoming this Nation's lag* in this scientific field, and urges their support of a comprehensive plan that will assure the United States permanent leadership in oceanographic research;" (Emphasis added).

A ten year plan for support of oceanographic research was accordingly established. The Navy showed a strong interest in this research. In "Project TENOC, The Next Ten Years in Oceanography, a Survey of the Growth Potential at Existing Institutions," issued October, 1958, it stated:

"1. The enclosed program explains how the Navy can *expand* the current effort in oceanographic research during the next ten years.

"2. The ocean is interposed between every system developed for the operation and detection of submarines and mines, and the successful application of these systems. . . . Oceanography forms the broad platform of knowledge which must be strengthened in order to support the applied problems facing the Navy.

* * * * *

"The United States Navy has a unique opportunity to supervise and foster the proper development of oceanography. Steadily increasing sponsorship should help ready us to nullify any threat from the seas."

The TENOC report begins:

"The following report was compiled by the

> authors as the culmination of their long felt need for steadily increasing emphasis on oceanography by the Navy. The Directors of the laboratories discussed were consulted as a matter of formality *to determine whether they would or would not, be willing to expand in size.*" (Emphasis added).

A National Academy of Science Report which was also favorably reported on in Senate Resolution 136 strongly recommended a rapid expansion of the oceanographic program at academic institutions as being necessary to overcome the oceanographic lag. That Report states:

> "Private foundations and universities, industry and state governments should all take an active part in the recommended program of expansion."[1]

In accordance with the federal mandate above set forth, Congress and the President initiated a national oceanographic program to be carried out in part by universities acting pursuant to contracts with governmental agencies. One of the many universities selected for inclusion in the program was Oregon State University (controlled by respondent State Board.)[2]

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[1] The National Academy of Science is a private, nonprofit organization which is required by its charter to serve as science advisor to the Federal Government. The particular report above quoted was requested and financed by several Government agencies.

[2] The TENOC report recommended the following institutions to participate in the program:
Chesapeake Bay Institute of Johns Hopkins University
Narragansett Marine Laboratory of Rhode Island State University

II

OSU Is But One of a Large Number of Government Contractors in the National Oceanographic Research Program.

Oceanographic research was started at OSU in 1954. The program carried on was initially quite modest. As late as 1959, the annual budget was only $10,000 with the Navy providing 90 percent of the total. OSU performed its research work in those years on small chartered fishing vessels. Later the University was permitted to use the ACONA, a U. S. Government vessel.

OSU's participation in this broad national oceanographic program grew rapidly. A larger vessel than the ACONA became required. In February, 1962, OSU submitted a proposal for such a larger vessel to the National Science Foundation, which was one of the Government agencies participating in this national program.[3] The proposal contemplated in general terms the providing of a ship which would have a stabilizing anti-roll tank to permit the vessel to operate more nearly full time in the normally rough

---

New York University
Lamont Geological Observatory of Columbia University
Scripts Institution of Oceanography
University of Washington
Texas Agricultural and Mechanical College
Oregon State University (then Oregon State College)
University of Miami

[3] The National Science Foundation is a government agency established with such functions, powers and duties as are set forth in 42 U.S.C. beginning at Section 1861. It is composed of 25 members appointed by the President with the advice and consent of the Senate.

weather of the Northern Pacific Ocean. Previously much time had been lost due to inclement weather.

The proposal specifically contemplated converting a surplus army air corps maintenance and supply vessel, the FS 210, into a research vessel which would be renamed the YAQUINA. The proposal, which was amended several times, was formally accepted on June 7, 1963, thus to become a grant agreement between OSU and the National Science Foundation.

III

The Government Furnished the Ship and Approved its Conversion for Oceanographic Research.

Pursuant to this agreement the FS 210 was transferred to the State of Oregon. Under the terms of the transfer, however, the ship could

> "be used only for the health or educational purpose for which acquired, including research for any such purpose, and for no other purpose."

Additionally, the grant provided for a period of restriction of two years, during which time OSU was prohibited from selling, leasing, encumbering, lending or otherwise disposing of the vessel without the consent of the U. S. Government. The grant agreement of June 7, 1963 included the further condition that:

> "The Grantee shall use the vessel primarily for the conduct of basic scientific research, and if the Foundation shall determine that she is not being used sufficiently and efficiently for research, the Grantee will convey her to the U. S.

> Government or its nominee without further cost to the Government. . . ."

A further condition was:

> "The Grantee shall not dispose of the vessel without the prior approval of the National Science Foundation. . . ."

The grant also obligated OSU to convey the vessel to the Government without cost in case of a declared national emergency.

The National Science Foundation required that the results of all research work done for it under the various grant agreements be incorporated in final technical reports submitted at the conclusion of each project. Fiscal reports were required in addition to the technical reports.[4] The contracts between OSU and the Navy and the Atomic Energy Commission contained similar requirements for reporting.

The grant agreement provided for the conversion of the FS 210 by a domestic shipyard. Accordingly, OSU entered into a contract with respondent Albina Engine and Machine Works, Inc., on May 4, 1964, to do the required conversion work. During such work, a number of additions and alterations were made in the specifications, all of which were approved by the Government, such matters being termed "Change Orders." One of these change orders, No. 6, included a drawing which contained the specific details of the

---

[4] Additionally, NSF is required by statute to render an annual report to Congress and the President. 42 U.S.C. Sec. 1862(c).

accused anti-rolling tank, which details were subsequently incorporated in the YAQUINA by respondent Albina. Change Order No. 6 was specifically approved by the Government in a letter dated August 28, 1964.

In October, 1964, the YAQUINA was put to work by OSU performing basic research in oceanography *solely* for the Government and primarily for three agencies thereof, the Department of the Navy, the Atomic Energy Commission and the National Science Foundation. Lesser amounts of work were performed for the Public Health Service. The entire cost of conversion was paid for by the Government grant. Likewise, all the operating and maintenance expenses for the YAQUINA were paid for by the Government.

Although the NSF funding was in terms called a "grant," it should be noted that OSU's work for the Navy and the AEC was done pursuant to actual contracts. As stated by the Court of Appeals:

> ". . . the National Science Foundation grant appears to have been primarily a financing device for work of special interest to the United States Navy."

IV

The Government Has Consented Specifically that the Manufacture and Use of the YAQUINA Is to Be Construed as Manufacture and Use "for the United States."

In order to make certain that OSU's operation and use of the YAQUINA for the Government were

not interfered with by way of patent infringement suits, the Government supplemented the consent implied in its August 28, 1964 letter with three papers issued subsequent to the commencement of the litigation. One such paper was issued by each of the three Government agencies concerned, the National Science Foundation, the Navy, and the Atomic Energy Commission. These documents specifically stated that

> "past, present and future manufacturing and use of the YAQUINA in performing oceanographic research under the national oceanographic program shall be construed as manufacture and use for the United States . . .",

thereby effecting an absolute assumption of liability by the Government.

It should be noted that in this case which involves but a small part of a huge national program, respondents do not seek to deprive petitioner of compensation for use of its patents. Respondents merely insist that petitioner go to the Court of Claims for its reasonable and entire compensation in accordance with the mandate of 28 U.S.C. Sec. 1498. If it should there appear that any of petitioner's patent rights have been violated, petitioner can and will obtain complete and entire compensation.

ARGUMENT

I

The Questions Presented by Petitioner Do Not Find Support in the Specific Facts of This Case.

This case involves the procurement by the Government of oceanographic research services by grant instruments in the form of binding agreements which when accepted created contracts between the agencies concerned and Oregon State University. In order to obtain such services the Government also procured the ship and the anti-roll tank in it. The District Court found as an ultimate fact that "the conversion and use of the YAQUINA, including the manufacture and use of the stabilization tank . . . were 'for' the Government . . . and with the authorization and consent of the Government." As such the statute provides that suits for patent infringement arising as a result of this procurement must be brought in the Court of Claims.

Petitioner seeks to distinguish this case by virtue of the fact that some of the procurement instruments were in terms called "grants" instead of "contracts." (The National Science Foundation used this terminology; the Navy and AEC, however, did their procurement by instruments actually called contracts.)

Whether the Government procures services by an instrument called a "grant" or by an instrument called a "contract" is really immaterial. In searching for the meaning and scope of an instrument, form

should be disregarded for substance and the emphasis should be on economic reality. *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967).

Furthermore, there is nothing about a grant that precludes it from being used for procurement if, as in the present case, procurement is what the Government wants. The Decision of the Comptroller General in 42 Comp. Gen. 289 (B-149441) states at page 293:

> "The term 'grant' as used in the statutes is subject to a variety of meanings, viz, contribution, gratuity, gift, method of payment or *procurement*. . . . Consequently, the meaning of this term . . . is to be determined from its connection and the manner of its use." (emphasis added)

That research services can be procured by grant is also evident from Part I of Section IV of the Armed Services Procurement Regulations entitled "Procurement of Research and Development." Under Section 4-101, research is defined as:

> (1) *Research*—includes all effort directed toward increased knowledge of natural phenomena and environment and efforts directed toward the solution of problems in the physical, behavioral and social sciences that have no clear direct military application. It would, thus, by definition, include all basic research and, in addition, that applied research directed toward the expansion of knowledge in various scientific areas."

In the National Science Foundation—A General Review of Its First 15 Years, 1966 Report of the

House Committee on Science and Astronautics, the following appears:

> "In practice, distinctions between grant and contract instruments by various federal agencies for support of basic research have been lost; both have been adjusted to meet needs."

Thus in the present case the Government, through its various agencies, the National Science Foundation, the Navy, and the Atomic Energy Commission

1. **directed that the research be procured,**
2. **furnished the ship,**
3. **approved the conversion plans and specifications,**
4. **suggested improvements therein,**
5. **reserved the right to inspect,**
6. **approved and ordered the installation of the anti-roll tank,**
7. **controlled the conversion work,**
8. **paid entire cost of conversion,**
9. **paid all maintenance and operational costs,**
10. **paid for all the research work done aboard the vessel,**
11. **considered the vessel as part of its fleet of oceanographic research ships,**
12. **required reports on all research work done,**
13. **required that interest earned on moneys advanced be refunded to the Government, and**
14. **submitted reports to the President and Congress.**

In view of these facts, the issues petitioner suggests are illusory. It may be true that the Government is becoming involved in an increasingly large number of new types of programs, some of which are

funded by grants which are in effect contracts, and others not. The facts set forth above, however, indicate that in the present case the Government was doing nothing more than procuring basic oceanographic research by contract with respondents, and that the funds expended were solely Government funds and recognized exclusively as such.

Thus it may be an interesting question as to whether some other federal grantee, whose project is less than 100 percent Government funded, is less than 100 percent for Government use and who is subject to less control and supervision than respondents herein, is or is not covered by the immunities conferred by 28 U.S.C. Sec. 1498. However, such a question is not pertinent to the instant case, and essentially calls for an advisory opinion which this Court is not likely to give.

II

This Case Involves a National Research Program Conducted by the Government, Not Local Assistance.

The facts in the instant case arose by virtue of a national oceanographic research program instituted and conducted pursuant to Congressional mandate. The situations covered in the various Comptroller General's opinions mentioned in petitioner's brief on the other hand, dealt with purely local situations. The Government money spent in the present situation was not for state schools or roads, *King County* v. *Seattle School District No. 1*, 263 U.S. 361 (1923); nor was it for a water boiler in a city housing project, unpub-

lished Comptroller General Opinion B-145140, May 3, 1961; nor was it for an elevator in a hospital project, Comptroller General Opinion B-141932, May 2, 1960; nor was it for any other local use. In the present situation the money was appropriated by the Congress for a governmental purpose in the national interest and with international aspects.

The opinion of the Comptroller General, 38 Comp. Gen. 276, 119 U.S.P.Q. 187 (1958), referring to the *Herbert Cooper* decision and to which petitioner refers on page 6 of its petition, did not limit the applicability of Section 1498 to the procurement of hardware. Rather that opinion merely held that the Government is obligated to buy from the lowest bidder irrespective of whether such bidder has a license from the holder of a patent, since the patent owner can have redress in the Court of Claims.

Furthermore, Comptroller General opinions pertain merely to the question of whether the Government is or is not obligated to pay a certain bill. The Comptroller General is not concerned with deciding the appropriate forum in which to try a suit for patent infringement arising from procurement for the Government under a Government contract.

The questions actually involved in the instant case have been long settled by this Court. In *Richmond Co.* v. *United States*, 275 U.S. 331 (1928), this Court said with respect to the precursor of the present statute:

"The purpose of the amendment was to re-

lieve the contractor entirely from liability of every kind for the infringement of patents in *manufacturing anything* for the Government and to limit the owner of the patent and his assigns and all claiming through or under him to suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture. The word 'entire' emphasizes the exclusive and comprehensive character of the remedy provided." 275 U.S. at 343. (emphasis supplied)

In the instant case, OSU was the contractor, all the other defendants were subcontractors, and the matter is covered by Section 1498.

III

There Is No Dispute About the Facts Which Govern This Case, and Petitioner Appears to Have Recognized the Correctness of the Decision Below in the Light of These Facts; What Petitioner Evidently Wants Is Obiter Dicta.

That petitioner recognizes the correctness of the decision below in the light of the specific facts in the instant case is borne out by the statement in its brief to the Court of Appeals (p. 21 thereof) that it "does not take issue with" the District Court's conclusions that:

> "(1) oceanographic research, including 'basic' research of unknown practical application, has been recognized by the legislative and executive branches as vital to the interests of the U. S. Government;
>
> "(2) the conversion and use of the YA-

> QUINA, including the manufacture and use of the stabilzation tank, were to equip it for such research, and therefore were 'for' the Government."

Indeed petitioner implies in its petition to this Court (page 4 thereof) that the decision is correct in the light of the specific facts of this case when it states:

> "The decision by the Court of Appeals—by restricting its holding to the specific facts of the case and not embracing the broader, more definitive holding of the District Court—fails to establish a precedent."

Even the petitioner's conclusion (page 13) recognizes that respondent State Board was a "Government contractor."

By these statements petitioner admits that the decision below turns upon the specific facts of this case, and while it may not set a precedent for other cases having different facts, is clearly correct for this case.

CONCLUSION

It is Hornbook law that every decision is based on the facts in the particular case before the court. That was done here and the decision is both clearly correct and equitably sound. So much seems to be admitted by the petitioner. What it criticizes is that the appellate court confined itself to the facts before it and did not wander afield to set up a "legal policy or guideline"[5]

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[5] Page 13 of petition.

to govern other situations based on other facts in other fields.

In short, petitioner wants from the Supreme Court an *obiter dicta* opinion. We cannot believe that this Court will yield to such a request. Under Section 1498, the petitioner here is entitled to its "reasonable and *entire* compensation" for infringement, if there was one, in the Court of Claims. In this instance petitioner simply filed its action in the wrong forum. The petition for the writ should be denied.

Respectfully submitted,

STEPHEN W. BLORE
Attorney for Respondent

JOSEPH B. SPARKMAN
ARTHUR L. WHINSTON
WILLIAM B. SHIVELY
Of Counsel